No. 20789

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUMBERMENS MUTUAL CASUALTY COMPANY, an Illinois Corporation, and WALDORF-HOERNER PAPER PRODUCTS COMPANY, a Montana Corporation,
Plaintiffs and Appellants

— vs. —

BABCOCK & WILCOX COMPANY, a New Jersey Corporation, and CLARAGE FAN COMPANY, a Michigan Corporation,
Defendants and Appellees

Appeal from the United States District Court
For the District of Montana
Missoula Division

BRIEF OF APPELLANTS

Lumbermens Mutual Casualty Company
Waldorf-Hoerner Paper Products Company

Appearances:

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Missoula, Montana
Attorneys for Plaintiffs and Appellants

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Clarage Fan Company

Filed: ....., 1966

....., Clerk

MISSOULIAN

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SUBJECT INDEX

TABLE OF CASES AND STATUTES

STATEMENT OF JURISDICTION

This action was originally commenced in the District Court of Missoula County, Montana, wherein the plaintiffs (citizens of Montana and Illinois) claimed damages of $50,993.00 from the defendants (citizens of New Jersey and Michigan) for breach of warranty and for product failure. (Complaint, Tr. I, p. 8).

The defendants removed the cause to the United States District Court by reason of diversity of citizenship, under 28 U.S.C.A. 1332 and 1441. (Petition for removal, Tr. I, p. 4).

Final judgment was entered January 17, 1966, dismissing the plaintiffs' complaint on the merits with prejudice. This appeal is taken from that judgment, under 28 U.S.C.A. 1291. (Notice of Appeal, Tr. I, p. 47).

STATEMENT OF THE CASE

The question raised by this appeal is whether the liability of the defendants on product warranty and for product liability was compromised and settled as a part of an agreed settlement of contract adjustments on the balance owing for the original installation of a $1,250,000 wood pulp recovery process.

This compromise and settlement issue was pleaded as an affirmative defense against the complaint for product liability, and was tried separately in advance by the court without a

jury, pursuant to stipulation of counsel. The Court found that the product liability was included in the settlement, and entered judgment finally dismissing the plaintiff's action on the merits with prejudice. We appeal from this judgment.

A brief chronological history of the matter is:

December, 1959—Defendant Babcock & Wilcox Co. (B & W, hereafter) contracted with plaintiff Waldorf-Hoerner Paper Products Company (Waldorf, hereafter) to furnish and install in operating condition a wood pulp recovery unit for a total price of $1,238,484.51, one portion being a "recovery boiler" and one portion being a "power boiler."

September, 1960 — The units were installed and commenced operation, so that the one-year warranty on the product came into effect.

March 30, 1961—A large induced draft fan in the recovery boiler spun apart and failed, causing a loss of $29,267.84, of which plaintiff Lumbermen's Mutual insured all but $1,000.00.

October 28, 1961—A second failure occurred in the same induced draft fan assembly, causing a loss of $21,726.99, of which again Lumbermen's insured all but $1,000.00.

August 28, 1962—A settlement conference was held in Missoula, Montana, between Waldorf and B & W, wherein B & W was claiming a balance due on the original contract of $25,576.00, and

Waldorf was claiming offsets against that balance. By agreement at the conference, Waldorf paid B & W $12,788.00, transmitting this payment with a letter shown in the transcript as Exhibit 1, (Tr. I, following page 28).

Note: Since Ex. 1, 2 and 3 are key documents in this case, we have reproduced them in the appendix to this brief for easy reference.

May, 1963—This action was commenced to recover on the subrogation rights of Lumbermen's.

The issue involved here was segregated for trial and submitted to the Court upon two depositions including the correspondence between the parties, and the testimony of two witnesses who were presented in court. The principals at the conference were Sandberg for Waldorf and Adamek for B & W, and these are the witnesses who testified by deposition. The court witnesses were Mourer and Countryman, who both agreed they were there only to assist. In the course of our argument we will point out that the Court's Findings are based upon the evidence in the depositions and correspondence, so that the reviewing court is really in as good position as was the trial court to examine and consider the evidence on the issue in question.

The entire dispute depends upon whether the parties in truth and in fact lumped together the adjustments arising from the original construc-

tion of the installation and the liabilities arising from the two product failures occurring six and thirteen months after the completion of the installation. Appellants contend that the settlement embraced only the adjustments arising from the construction process, and that no one at the settlement conference undertook to evaluate and settle the warranty liability of $29,267 and the product failure liability of $21,726.

The record shows without dispute that the offsets and backcharges asserted by Waldorf as adjustments on the original contract price exceeded the $12,788 finally paid in settlement, and further shows that nowhere in the writings was there a single word from Waldorf to the effect that Lumbermens' subrogation claims were being included in the settlement. The record will show, therefore, that if the $50,994 of warranty and product failure losses were included in the settlement, they must have been included for an absolutely nominal amount. The record shows that B & W does not dispute its warranty, while if this judgment is affirmed it will escape therefrom scot-free, a result so abnormal that the injustice and error in it are certainly manifest.

By the foregoing we are endeavoring to illustrate that there were two natural and normal areas for settlement discussion between the parties, and that the actions and communications of

the parties must be interpreted within these dual frames of reference. The detail of our argument will be to show that the warranty and product liability area was never in fact included in the settlement negotiations. The District Court's Findings VIII and IX (Tr. I, p. 44) are clearly erroneous, and should be set aside.

SPECIFICATION OF ERROR

1. The Court erred in making its Findings of Fact (Tr. I, p. 42-44) and Conclusions of Law (Tr. I, p. 45) adverse to the plaintiffs, especially in that:

By Findings of Fact VI, VII and VIII, the Court holds that the parties consolidated all their differences as to claims and liabilities into one subject, one conference, and one settlement, and these are so contrary to the evidence in the record as to be clearly erroneous under Rule 52(a). The Court should have found that the parties segregated their differences into (a) those relating to the completion of the original wood pulping process installation, and (b) those relating to later product failures which were subject to insurance protection, special warranty, and general product failure liability, and that the settlement made by the parties covered only (a) so that it would not bar the present action for (b).

These Findings are contrary to the express personal testimony of the two adversary princi-

pals, and to all the evidentiary probabilities in the case, as will be explained in argument, and are therefore clearly erroneous under Rule 52(a).

By Finding IX, the Court holds that the position of the plaintiffs as set forth in its letter of transmittal of final payment was modified by the defendants' letter of response thereto, so as to bind the plaintiffs to the position of the defendants, whereas the Court should have found from the face of the letters themselves that the plaintiffs' position was expressly made applicable to (a) above, and that this limitation to (a) was not disaffirmed or modified by the defendants so as also to include (b), it being the duty of the defendants rather than the plaintiffs so to do. For this reason the Finding is clearly erroneous under Rule 52(a).

By Conclusion of Law II and III, the Court holds that the plaintiffs' "claims on account of the contracts . . ." and "the original obligations of the parties . . ." under the contracts were settled, (Tr. I, p. 45) and that these included the (b) liabilities which arose six and thirteen months later under express warranty and product failure law. It was clearly erroneous to conclude that settlement of the "original obligations" included the later fan failure obligations which have a legally different basis of liability, and which were

excluded by the terms of the plaintiffs' letter of transmittal of payment, Ex. 1.

2. The Court erred in entering judgment on the merits dismissing the plaintiffs' cause, because its Findings and Conclusions are not supported by the evidence for the reasons set forth in Paragraph 1 above, and are therefore clearly erroneous.

ARGUMENT

Introduction

The substantial evidence in the record is all in documentary form, and was considered by the District Court exactly as this Court is considering it. The two witnesses the Court heard in live testimony were the assistants to the principals, Sandberg and Adamek, and were presented simply so that all persons who participated in the August settlement conference would have been heard from. The depositions of the principals were taken, reviewed and corrected by them, signed and sworn to, and therefore represent the true, first-hand, considered statements of the positions of their companies.

We acknowledge our burden on this appeal, under Rule 52(a) and

Lundgren v. Freeman, 307 F.2d 104,

to show that the findings are clearly erroneous, despite the weight to be given to the District Court's initial consideration of the facts. How-

ever, we believe we can carry this burden in this particular case, due to the monstrous miscarriage of justice which has occurred here.

We shall undertake this by making four specific points:

1. There is no statement in the writings between the parties to the effect that the warranty and product liability claims are *included,* while the settlement detail from Waldorf in Ex. 1 *excludes* them by its explicit inclusion of other items totaling the $12,788 compromise payment.

2. The two principals who would have negotiated the settlement of these claims if they were settled *both* swear this was not done. (The District Court's finding VIII is absolutely contrary to this testimony from both parties, and is therefore not supported by any evidence.)

3. No substantial consideration of any kind was paid or received for the settlement of claims totaling over $50,000.00, one of which was based on undisputed warranty that should not have been subject to discount.

4. It is improbable, and in fact incredible, that experienced businessmen would have included the warranty and product liability issues in the settlement when

   a. Waldorf was thereby destroying Lumbermen's rights without its representation;

   b. Adamek was going completely outside the

province of the Sales Department;

c. There was no effort even to ascertain the amounts involved under the warranty;

d. Normal releases of claim from Waldorf to B & W, Clarage Fan, for their insurers, their business records, etc. were not obtained.

1. *The writings do not establish a settlement of the fan failure claims.*

Sandberg's letter of September 7, 1962, Ex. 1, is not a model of clarity in expression, perhaps, but in the context of previous correspondence and relations between the parties it is easily understood. In the second paragraph he lists six items with amounts totaling $12,788.00 as out-of-pocket costs supplied by Waldorf for the completion of this project, and sends the check for the difference between those items and B & W's conceded contract balance.

The District Court paid no attention to his wording "for the completion of the project." Sandberg was referring to expenses incurred before the new installation ever got into operation, which is to be markedly distinguished from warranty and product failures arising six and thirteen months later. Thus, on the written record, Waldorf stated that the payment was for items involved in the "completion" of the project, which automatically excludes items arising long

after completion. We want to make it clear that not only did Waldorf say nothing to the effect the warranty and failure issues were included in the settlement, but it clearly said the settlement was composed of items involved in the completion of the project.

As we will show more in detail under Point 3, every dollar of the six items listed in this letter were unquestioned, legitimate backcharges or offsets, and therefore cannot be a cover-up for the liabilities in issue here. Surely, if these men had openly and consciously negotiated a total settlement which included the product failure liabilities, this letter would have unmistakably said so and would have been in different form. Ordinary honesty and accuracy would cause the letter to reflect the agreement, for certainly if it was a genuinely agreed to settlement there would be no point in disguising it.

Much was made by our opponents of the succeeding paragraph in Ex. 1, where Sandberg says no allowance has been made for the fan failure, etc., and he does not consider the settlement satisfactory, as though those statements prove that settlement of the product failures was negotiated and included. The Court cannot fail to get from those statements that in the mind of the writer *no* payment or allowance had been made on those items, and that is the point—if *no* allowance or

payment is made for them, then they had not been settled. Since the other items were all legitimate, it follows of necessity that if the settlement reference included everything, then $50,000 of liability claims, $29,267 on a clear written warranty, were disposed of for *no payment at all.* These words cannot reasonably be interpreted as expressing that result.

At this point we ask the Court to examine very closely these closing letters, Ex. 1 and 2. Sandberg in Ex. 1 in the plainest terms acknowledges the $25,576 owing on the contract, lists his six items for $12,788 of backcharges, and sends his check for the difference. By the most explicit words, all this is related to the original transaction. He uses the words "outstanding invoices on the above purchase order," and "out-of-pocket costs . . . for the completion of this project." The payment is of $12,788 as "the balance after deducting the expenses listed above from the outstanding invoices to bring this account to a close."

We contend that when Sandberg thus bracketed the payment he was making, the payment was by law limited to that bracket unless changed after formal rejection by B & W upon being received. If that bracket was unacceptable to B & W, it should have sent the check back, or demanded a change in the bracket.

Now the Court should turn to Ex. 2, B & W's reply. It accepts the payment as "the amount agreed upon for Contracts PR-58 and PFI-2799." Those contracts cannot in any way be found to embrace warranty and product failure claims arising long later, and thus B & W accepted Waldorf's bracketing of the payment.

Its later language, demurring to the charge that B & W had done nothing about the fan failures, is in no respect a rejection of Waldorf's terms of payment already accepted in the first paragraph. This is made finally clear by the closing paragraph where the *only* reason the Waldorf payment was not passed on to the Treasury was the inadvertent reference to the Contract SC 1387.

Montana codifies the general rule on application of performance by

> Section 58-407, R.C.M. 1947:
> "*Application of general performance.*
>
> . . . . . .
>
> 1. If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, he manifested to the creditor, it must be so applied."
>
> . . . . . .

The stating of that correction and the omission of any other correction makes it inevitable that under the applicable law the payment of $12,788

was limited to the closing of the original purchase order and the completion of the project. It is therefore legally impossible to contort the language used into the inclusion of two separate and distinct types of liabilities that had no reference whatever to the completion of the project, and never even arose until long after the project was completed and in operation.

The Court's Finding IX is therefore clearly in error, for it was not Waldorf that "proceeded with the settlement" on B & W's terms in Ex. 2, but B & W that proceeded with the settlement on Waldorf's terms in Ex. 1.

2. *The principals testify there was no settlement of fan failure claims.*

The principals were Nels Sandberg, chief executive of Waldorf, and Frank Adamek, Sales Manager of B & W for the Waldorf territory. They signed the letters, Ex. 1 and 2. Adamek perfected the arrangements for the meeting (Tr. II, p. 31, l. 8) and was "carrying the ball all the way through," as distinguished from the witness Mourer (Tr. II, p. 29, l. 19). The settlement of 50-50 was his suggestion, not Mourer's. (Tr. II, p. 31, l. 11-18).

If a settlement of the product liability issues was made, it had to have been voluntarily and consciously negotiated and agreed upon by these two men. In Finding VIII the District Court

found that these two men used language "appropriate to effect that intention."

We here set forth the testimony of these men as it is in their signed depositions, which this Court can read as readily as did the District Court.

(Deposition of Frank A. Adamek, p. 35, l. 5, ff)

"Q. Let me ask you whether in the course of this meeting there in August of 1962 you and the service department and Mr. Sandberg undertook to discuss and negotiate out any liability of either your company or the Clarage Fan Company on the warranty for the induced draft fan or responsibility for the failure of the fan?

A. Not that I recall.

Q. And this would not have been a province of the service department, I take it?

A. I don't believe it would be.

Q. And really it would not be a part of the function of your department, the sales department?

A. That's true."

(Deposition of Frank A. Adamek, p. 44, l. 22, ff)

"Q. Now, does that recall anything to you with respect to the conversation between Mourer and Sandberg as to whether or not they had discussed the responsibility for the fan failures at your meeting?

A. I can't recall any specific statements or

anything, but the responsibility for the fan failure, since it happened within the one year period and we have a one year warranty on material, is definitely Babcock & Wilcox's responsibility to replace it.

Q. Yes, but was there a discussion about this?

A. I can't recall."

Then Mr. Sandberg:

(Deposition of Nels Sandberg, p. 22, l. 13, ff)

"Q. In the back charge items which you discussed with B & W on the occasion of this August 28th meeting; were there included any amounts at all with reference to the failure of the induction fans as you have described them?

A. None whatever.

Q. Was there negotiations between you and Mr. Adamek as to whether B & W was liable for that failure or Waldorf was liable for the failure or whether anybody was liable for the failure?

A. No.

Q. Was there any discussions between you and Mr. Adamek concerning responsibility on the part of B & W under any warranties that accompany the contract of installation for the recovery boiler?

A. Not at that time."

(Deposition of Nels Sandberg, p. 28, l. 15, ff)

"A. I say again, September 7, 1962, the discussion of the failure of these fans did not come up under adjustment as to who was responsible; who was responsible

was not discussed and Waldorf at no time had invoiced B & W for anything trying to recover any expenses that we had gone to."

We believe these statements by Mr. Adamek are really conclusive of the issue. The question to him was clear and explicit, and his answer unequivocal. They not only did not negotiate these liabilities to settlement, it would have been beyond their province to do so. These are not unconsidered answers, either, for Mr. Adamek read over, corrected, and then signed his deposition, so that the position he took is unquestionably correctly stated.

We also believe it helpful to review the earlier correspondence between Sandberg and Adamek, most of which is attached to Adamek's deposition. These show that the two men had a clear working relationship, an ability to express themselves understandably, and that they had the same concept of what they were calling "settlement." With them it was not the same as with lawyers, who use "settlement" in reference to controversy. With Sandberg and Adamek, settlement referred to the adjustment of the various charges and unusual expenses or happenings that occur in the course of a large construction project, so as to determine the ultimate final balance on the contract price.

This is conclusively demonstrated by refer-

ence to the letters of March 20, March 30 and April 3, 1961, passing between Sandberg and Adamek, which are a part of Adamek's deposition. The reason these are important is that they antedate consideration of any fan failure, and yet show that the parties were planning about getting together to "settle not only this matter but also begin to negotiate the final settlement of the No. 2 recovery unit." These make it perfectly clear that Sandberg and Adamek were discussing invoices that were referable to the original contract of purchase and installation, and that when they speak of "settling" it is with direct reference to the initial contract obligation and not to subsequent issues of breach of warranty and product liability.

The correspondence between the parties runs from March 20, 1961 until September 10, 1962, a period of 18 months. The Court cannot read the entire exchange of correspondence and get from it the slightest reference by the parties to the inclusion of warranty liability or product liability within the scope of negotiation and "settlement."

As we have been saying, there were two subjects for settlement, one the original price less usual backcharges and two, the warranty and product failure items primarily belonging to the plaintiff insurer. Sandberg and Adamek were

dealing and speaking in reference to their normal province, the original contract less adjustments, and their letters must be read in that context. This makes it perfectly understandable and reasonable that in the August meeting they talked about those items and did not talk about the claims now in suit. Since this is what they did at the meeting, so also it is what their letters mean in their reference to "settlement."

3. *No substantial consideration was paid for a settlement of fan failure losses.*

In normal business affairs, debts are paid at par and warranties are made good to the same extent. When a firm like B & W warrants a million-dollar installation, and a failure occurs within the warranty, it is normal to expect that it would make good the loss. Here was a loss of $29,267, of which Lumbermens paid $28,267, and for the purposes of this case we can assume that this was a correct figure.

The product failure was beyond the warranty period but involved a second and similar failure of the same fan, and it cost $21,726. Again, for the purposes here it has a face value of that sum, though legal liability may be more difficult to establish than warranty liability.

While we contend these claims for $50,000 were not discussed or included, under the Court's findings these would be added to the other items

in issue between Sandberg and Adamek at their meeting. Let us now consider these other items so as to determine what was in issue. In Sandberg's deposition, pages 15 to 20, is a description of them, including the ones enumerated in Sandberg's letter, Ex. 1. The Court will note that they involve much more than $12,788.00, and include a large item involving responsibility for the constant failure of water wall tubes in the power boiler, as to which the parties were in total disagreement.

This situation appears in the Court's Findings as follows:

> "IV. During the time of installation, Waldorf had advanced and expended certain amounts of money for freight, replacement parts and services and had also expended sums in repairing the fan following the failures." (Tr. I, p. 43)

The Court will further find that Adamek agrees the explanations of Waldorf's offset or backcharge items by Sandberg are correct, in his testimony at pages 23 to 27 of his deposition.

Therefore, the situation is that Sandberg and Adamek lumped together the smaller items as listed in Sandberg's letter, Ex. 1, at $12,788, items that are uncontested in this record, abandoned the argument over the water wall tubes, and settled their account "for the completion of the project."

Now, for what consideration can the warranty and product liability be found to have been also included? The record is barren of any sum at all that can be said to be a payment for some $50,000 of liability, $29,267 of it not practically in dispute. If the parties had explicitly written that they had agreed upon such a settlement, strange though it might seem, one might accept it, but they have not. Yet, the Court finds this to be the fact against the letters which do most certainly not say so explicitly, against the sworn testimony of the two principals that they did not do so, and against the utter improbability that any such agreement took place.

Reply to this may be that in Adamek's letter, Ex. 2, responding to Ex. 1, he sets forth a different set of items reaching the figure of $12,788. Mourer had prepared the list, and later he used it to report in detail to B & W in "connection with the accounting records of your (B & W) Company." (Tr. II, p. 33, l. 1-8). This list includes some items referable to the fan failure, and the argument has been that by virtue of the later letter, Ex. 2, the meaning of the earlier letter, Ex. 1, is to be changed and the fan failures included in the deal.

Such a contention does violence to the facts. In reality Ex. 1 and Ex. 2 are the final closing records of the original capital transaction for the

internal accounting records of the parties. This is specifically how Sandberg viewed Adamek's letter, Ex. 2, and why he did not question the differences in the itemization. (Sandberg dpo., p. 40).

To demonstrate this, let us examine one or two of the items in detail. Sandberg included $1,024.24 as freight on B & W shipments that Waldorf had paid, and obviously this was a correct backcharge. Both Adamek and Mourer admit this. Yet, it is excluded from the list of items in Ex. 2 by B & W. Likewise, Waldorf had expended $2020 for a crane operator and oiler for the use of B & W's steel erector, C. C. Moore Co., and the validity of this backcharge is not questioned. Yet it, too, is excluded from the list in Ex. 2, whereby room is made in the total to insert $3078 of items related to the fan failure.

Still more strangely, B & W included in its list an item of $788 on SC-1387 (last item listed) which was utterly foreign to the whole transaction, as further manifested in the last paragraph of Exhibit 2. We think this conclusively demonstrates that Ex. 2 was an internal accounting record for B & W and not a re-casting of the settlement by including the fan failure claims. There is simply nothing at all to show a recited or agreed consideration in any amount whatever for those claims.

4. *It is incredible that such a transaction would be handled in this manner.*

We are reminded of Mr. Louis Nizer's comments on the rule of probabilities as a guide to the truth, and believe it is applicable here.

In this case we are dealing entirely with educated, experienced, responsible businessmen, all acting in a familiar field, and under no unusual stress which might have affected their normal abilities. We have shown that Sandberg and Adamek had long been corresponding about "settling" their contract balance, and that this was normal procedure apart from any product failure. The fan failures intervened, giving rise to two kinds of liability different from the contract price and legitimate backcharges. An insurance company had become the owner of the later liabilities by paying some $48,000.00 for the losses they represent.

Normally, the discussion of settlement of those product liabilities would take place between the insurer and the company against whom liability is asserted. If there was a question as to liability or amount, the attorneys for the company would become involved, and the facts carefully ascertained. If a settlement was agreed upon, formal releases of claim would be executed, and the entire transaction documented for business record purposes. The settlement terms and

payment would be clearly described.

Nothing even remotely similar occurred here. The insurer never knew of the matter, else it would not have started this case. No attorneys were consulted by anyone, and no facts were assembled or discussed in any detail whatever. The people representing the defendant were its salesman and its serviceman, whose normal duties did not include settling liability claims. No releases of claim were presented, obtained or sent to anyone, and the letter reporting the transaction to B & W most specifically did *not* say that the fan failure exposures had been settled and closed out (Exhibit X). As we pointed out earlier, there is not a simple clear statement anywhere that the fan failures were settled, and yet it is the most normal and natural thing in the world for that to have been reported in the ordinary course of business.

CONCLUSION

We believe all our four points, as argued in this brief, mutually support and strengthen each other in the conclusion that this settlement was for the matters related to the "completion of the project" and not to the product liabilities arising so much later. It is really rare to find a situation where there is so much negative evidence, so completely documented, and yet to have the Court

make findings that a given event occurred notwithstanding.

The result of the Court's decision shocks the conscience. By any means or measure one can possibly find in this record, very substantial claims belonging to a third party are held to have been settled and disposed of for no visible consideration or payment of any kind. This is so contrary to justice, to reason, to the sworn words of the principals themselves, that one cannot help concluding the findings are clearly erroneous, and that the cause should be reversed for trial upon the merits of the fan failure claims.

Respectfully submitted,
GARLINGTON, LOHN & ROBINSON,
J. C. Garlington,
Attorneys for Appellants.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. C. Garlington

Attorney

APPENDIX

COPY EXHIBIT 1

WALDORF-HOERNER PAPER PRODUCTS CO.
Missoula, Montana
St. Paul 14, Minnesota
September 7, 1962

Mr. F. A. Adamek
The Babcock & Wilcox Company
Northwestern Bank Building
Minneapolis 2, Minnesota

Dear Frank:

Please refer to our conference at Missoula last week regarding the settlement of our account with you on B&W contracts SC-1387, PR-58, and PFI-2799, and our purchase order 2220.

The following represent all the outstanding invoices on the above purchase order:

Removal of steel for power boiler	$ 708.07
Escalation on material for No. 2 Recovery	986.00
5% due on erection of No. 2 Recovery	11,399.75
5% Escalation on No. 2 Recovery	7,243.73
5% on erection of Power Boiler	2,592.60
Escalation cost on Power Boiler	2,645.85
Total	$25,576.00

The following items are Waldorf-Hoerner out-of-pocket cost for material and services provided for the completion of this project:

Convert 11 soot blowers to motor drives	$ 4,180.00
Removal and replacement of structural steel by Hightower & Lubrecht for Recovery Boiler	2,478.00
Removal and replacement of steel by Hightower & Lubrecht for	

Power Boiler	708.07
Crane operator and oiler furnished by Hightower & Lubrecht	2,020.00
Freight on parts shipped collect	1,024.24
Allowance for replacement of I.D. fan expansion joint	2,377.69
Total Waldorf-Hoerner Net Cost	$12,788.00

You have refused to consider any allowance for Waldorf-Hoerner labor and supervision; travel expense of the writer and Waldorf, St. Paul, engineering staff, Westinghouse and Clarage Fan Company servicemen's labor and material to restore the No. 2 I.D. fan and drive after two complete failures (the first one occurred within the one year warranty period. We estimate that this amounts to about $50,000 in round figures; not making any allowance for the loss of production. We could hardly be expected to consider this settlement satisfactory; however, we do not wish to carry on this negotiation any longer; therefore, we reluctantly have approved the payment of $12,788.00 (this is the balance after deducting the expenses listed above from the outstanding invoices) to bring this account to a close.

You also agreed to settle with C. C. Moore their billing for extra supervision and tool rental in the amount of $3,236.72—a charge which we feel is not justified since the work involved was actually part of the installation of those boilers.

Yours very truly,
WALDORF-HOERNER
PAPER PRODUCTS CO.
N. H. Sandberg
President

NHS:jpg
cc: A. B. Carlson

Stu Nicholson
Missoula File

EXHIBIT 2

September 10, 1962

Mr. N. H. Sandberg
President
Waldorf-Hoerner Paper Products Company
Missoula, Montana

Re: Contracts PR-58 & PFI-2799

Dear Mr. Sandberg:

I was pleased to receive your letter of September 7, 1962 relative to the conference held in your Missoula, Montana plant and your check No. 001170 dated September 7, 1962, in the amount of $12,788.00, which is the amount agreed upon for contracts PR-58 and PFI-2799.

Your letter mentions Contract SC-1387 which is for the steam atomizing venturi equipment for your first Recovery Boiler, PR-44. The two invoices outstanding on this contract were not discussed, nor included in the settlement made at your plant. The following two invoices on SC-1387 are still outstanding:

A-49 January 17, 1961 ..... $10,669.00
A-126 January 30, 1961 ..... $ 800.00
which makes a total for this
contract of $11,469.00

The total of our outstanding invoices on PR-58 and PFI-2799 amounts to $25,576.00. The amount decided upon to settle those invoices was $12,788.00, or just half of the above total figure.

In reference to the last paragraph on page 1 of your letter you mentioned that we had refused to consider any allowance for Waldorf-Hoerner labor and supervision, travel expenses for your-

self, and Westinghouse and Clarage Fan servicemen for labor to restore induced draft fan on PR-58. This, I am sure is not altogether correct as we have given an allowance for Clarage service of $620, balancing expert and instruments $700, outside machining of fan shaft $350, rebabbit bearings and machining $408.

To arrive at the figure we used which is $12,788.00, the following credit was allowed your concern:

1. Install new door and seal strips on PFI-2799 ..... $ 600
2. Install new expansion joint above windbox on PFI-2799 672
3. Revise sootblower drives on PR-58..... 4280
4. Install new expansion joint between ID fan and stack on PR-58 900
5. Induced Draft Fan:
   a. Clarage Service 1620
   b. Balancing expert and instruments..... 700
   c. Outside machining of shaft 350
   d. Rebabbit bearings and machining..... 408
6. Removal and replacement of building steel for erecting PR-58 1762
7. Removal of building steel for erection of PFI-2799 including Crane Operator and Oiler 708
8. Stainless steel clad flue from Venturi to elbow SC-1387 788

Along with the above, we took care of the repair and straightening of your induced draft fan shaft in the sum of $1500. We furnished for the induced draft fan on your Recovery Boiler two new heavier rotors made of Corten material amounting to $7,165.00.

I have not passed your check on to our New York Treasury Department because of a refer-

ence to Contract SC-1387 in the first paragraph of your letter. This contract was not discussed and was not included in the figure of $25,576.00 that you have tabulated. I am assuming reference to Contract SC-1387 included in your letter was in error, but will you please confirm so that I may forward your check?

Very truly yours,

THE BABCOCK & WILCOX COMPANY

cc: R. Weshoff, NY Treas.
R. V. Mourer, Denver
Chicago S.

F. A. Adamek

EXHIBIT 3

WALDORF PAPER PRODUCTS CO.
St. Paul, Minnesota

September 11, 1962

Mr. F. A. Adamek
Babcock & Wilcox Co.
Northwestern Bank Building
Minneapolis 2, Minnesota

Dear Frank:

I have your letter of September 10 and please be advised that the reference to the contract SC-1387 made in our letter of September 7 is in error.

I have approved the invoice covering this contract and Mr. Carlson will issue a check shortly.

Very truly yours,

WALDORF-HOERNER
PAPER PRODUCTS CO.
(Signed) N. H. Sandberg
N. H. Sandberg
President